

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint No. : 1229 of 2018
Date of first hearing : 06.03.2019
Date of Decision : 28.03.2019

1.Mrs. Kusum Mohindra
2.Mr. Abhinav Mohindra
R/o Flat no. 1602, Tower F, Sunshine Helios, ...**Complainants**
Sector 78, Noida-201301

Versus

M/s Imperia Wishfield Pvt. Ltd.
Office at: A-25, Mohan Co-operative
Industrial Estate, Mathura Road, New Delhi ...**Respondent**

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Smt. Kusum Mohindra Complainant no. 1 in person
Shri Parikshit Kumar Advocate for the complainants
Shri Ishaan Dang Advocate for the respondent
Shri Rohit Sharma Authorised representative on
behalf of the respondent
company



ORDER

1. A complaint dated 09.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read

with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainants Mrs. Kusum Mohindra and Mr. Abhinav Mohindra, against the promoter M/s Imperia Wishfield Pvt. Ltd., in respect of apartment described below in the project 'Elvedor' on account of violation of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the buyer's agreement has been executed on 13.03.2014, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligations on the part of promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Elvedor" in Sector 37-C, Gurugram
2.	Nature of real estate project	Commercial complex
3.	Unit no.	7_A04, 7 th floor
4.	Unit area	659 sq. ft.
5.	Project area	2 acres
6.	Registered/ not registered	Not registered Note: The project in question was earlier



		named 'Esfera'. Vide regn. no. 352 of 2017, Esfera (Phase-II) situated in Sector 37C is registered. However, there is no registration in the name of 'Elvedor'.
7.	DTCP license	47 of 2012 dated 12.05.2012 Note: License bearing no. 47 of 2012 expired on 11.05.2016
8.	Date of booking	29.03.2012
9.	Date of provisional allotment letter	24.09.2012
10.	Date of approval of building plans	25.06.2013
11.	Date of buyer's agreement	13.03.2014
12.	Total consideration	Rs. 36,51,949 /- (as per buyer's agreement)
13.	Total amount paid by the complainants	Rs. 31,84,473/- (as alleged in the complaint)
14.	Payment plan	Construction linked plan
15.	Date of delivery of possession	13.03.2019 Clause 11(a) – 60 months from date of execution of agreement i.e. by 13.03.2019
16.	Delay of number of months/ years till 28.03.2019	15 days
17.	Penalty clause as per buyer's agreement dated 13.03.2014	Clause 14- Rs. 20/- per sq. ft. per month of the super area



4. The details provided above have been checked on the basis of the record available in the case file which have been provided

by the complainant and the respondent. A buyer's agreement dated 13.03.2014 is available on record for the unit described above in the project Elvedor according to which the due date of possession comes out to be 13.03.2019.

Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. Accordingly, the respondent appeared through his counsel on 06.03.2019. The case came up for hearing on 06.03.2019 and 28.03.2019. The reply has been filed by the respondent and the same has been perused.

Facts of the complaint

5. Briefly stated, the facts of the complaint are that the complainants booked a unit in the project named "Elvedor" in Sector 37-C, Gurugram by paying an advance amount of Rs.1,00,000/- to the respondent. Accordingly, a provisional allotment letter dated 24.09.2012 was issued and the complainant was allotted a unit admeasuring 659 sq. ft.
6. The complainant submitted that at the time of applying for the studio apartment, the were informed that the respondent had the complete right, title and authorization on the project land and also had the requisite sanctions and approvals from the relevant authorities to undertake such construction. It was



further informed that the project will be completed within a period of 60 months from the date of booking and the complainants will be handed over possession of the studio apartment in question in the said time period. It was on the basis of such representations that the complainants paid the abovesaid booking amount.

7. The complainants submitted that after the booking of the studio apartment no buyer's agreement was executed. The complainants were finally issued a welcome letter 3.12.2012 wherein the respondent acknowledged the complainants as customer for the studio apartment admeasuring 659 sq.ft.
8. The complainants submitted that the respondent subsequently issued an allotment letter dated 30.09.2013 wherein the respondent unilaterally changed the allotment of the commercial unit to 10_A04 on the 10th floor without the consent of the complainants. It was further assured that the buyer's agreement will be sent to them shortly.
9. The complainants submitted respondent in his demand letter wrongly mentioned the unit no. as 10_A04 which was a unilateral change on the part of the respondent. Owing to such unilateral changes, the complainant protested against the change. However, after several discussions, the respondent



conveyed that no unit was available on the 5th floor and under the circumstances, the complainant were constrained to accept another unit on the 7th floor numbered as 7A04 in the project Elvedor and were further informed that no changes would be made to the allotment.

10. The complainants submitted that after a span of 6 months the respondent also supplied a copy of the buyers agreement enclosing a buyers agreement in respect of unit no. 7_A04 situated in the said project.
11. The complainant submitted that in the agreement, it was represented that the said land was owned in part by one Mr. Devi Ram and in the other part by M/s Prime IT Solutions Private Limited. M/s Prime IT Solutions had entered into a collaboration agreement and general power of attorney in favor of M/s Prime IT Solutions Private Limited. The said Prime IT Solutions subsequently applied for and purportedly obtained a license bearing no. 47 of 2012 dated 12.05.2012 in respect of the project land. Subsequently, Prime IT Solutions entered into collaboration with the respondent pursuant to which the project was being implemented. It was further represented that development plans had also been approved on 24.05.2011 and based on such approvals, the respondent is



competent and entitled to execute the project. Believing such representations to be true the complainant executed the buyer's agreement dated 13.03.2014.

12. The complainants submitted that upon execution of the agreement, the respondent continued to issue demand letters purportedly as per the stage of construction and the complainants continued to make payments in respect of the same as evidenced by various receipts issued during the contemporary period.
13. The complainants submitted that as per the demand letters the respondent had purportedly undertaken construction till the 15th floor by May 2016 itself and demanded instalment in lieu of the same. The complainants has paid a sum of Rs.31,84,473/- to the respondent, amounting to almost 90% of the total price payable by the complainant.
14. The complainants submitted that subsequent to receipt of almost 90% of the total price, the respondent did not undertake any construction on the project. The complainants repeatedly requested the respondent to provide status of construction as well as information on the expected date of delivery of the project. However, no response was forthcoming on the part of the respondent.



15. The complainants submitted that they started making enquiries from other allottees who were similarly situated in the project, and were shocked to learn that neither did the respondent have any right in and over the land at the time of booking, nor did the respondent have requisite sanctions or approvals from the concerned authorities. As such all the representations provided by the respondent in terms of the buyer's agreement were found to be deceptive and false. The complainant also became aware of the following facts:

- (i) A license / letter of intent was issued in favor of Prime IT Solutions Private Limited (and not the respondent) on 24.05.2011. As per clause 25 of terms and conditions of the said letter of intent, the colonizer (i.e. Prime IT Solutions Private Limited) was required to provide an undertaking to the effect that land is not being sold to anyone after issuance of the letter of intent. As such, it is evident that a pre-condition for issuance of letter of intent / license was that there is no collaboration agreement / agreement to sell which is in force on the project land. Therefore, neither did the respondent have any license in its favor nor was it, in any event, without a separate license issued in its favor, entitled to acquire the land or undertake construction on the same.



- (ii) Further a license bearing no. 47 of 2012 was issued in favor of the Prime IT Solutions on 12.05.2012. However, the DTCP Haryana website clearly shows that in fact such license has expired on 11.05.2016 itself, i.e. prior to receipt of last payment. Further, the respondent did not even have the license to construct up to 15th floor as evident from the sanctioned plan available on the website. This essential fact was also actively suppressed.
- (iii) The collaboration agreement dated 06.12.2012 which was the governing document granting the respondent right to undertake construction and development was in fact unregistered. Consequently, at the time of undertaking booking for the complainants, the respondent had no right in and over the said land.
- (iv) The complainants further learnt that vide a general power of attorney purportedly registered, Prime IT solutions had agreed to sell, transfer and convey the project land in favor of the respondent. Even as on the date of execution of the buyer's agreement, no sale had taken place, and neither was any registered development agreement executed.
- (v) In fact, the respondent in order to enforce its purported rights against Prime IT Solutions filed a civil suit before the Ld. Civil



Judge (Jr. Division) wherein a compromise was executed between the parties to the suit. Pursuant to such compromise dated 12.01.2016 and a compromise decree dated 21.01.2016, the respondent presumably has acquired rights in respect of the project land. However, as is evident, the respondent still does not have the requisite sanction from the concerned authorities to undertake construction over the lands since the approval/license was issued only in the name of Prime IT Solutions and not the respondent. As such the construction is completely not sanctioned and this fact has been actively concealed by the respondent for almost 6 years.

16. The complainants further submitted that even after expiry of 6 years from the date of booking, till date only a rudimentary structure of one out of the several buildings forming part of the project has been erected on the project land which is incapable of possession. Additionally, there is no other development on the project land for last two years and the construction activities have been stopped since 2016.

17. Issues raised by the complainants

The relevant issues raised in the complaint are:



- I. Whether the respondent has misrepresented to the complainants that it has the necessary sanctions and approvals in place to undertake construction of the proposed project?
- II. Whether the respondent has abandoned the project and consequently and in view of expiry of the license granted to Prime Time Solutions, the respondent is liable to refund the amounts along with interest to the complainants?
- III. Whether the respondent has failed to provide possession of the unit in question without any reasonable justification?
- IV. Whether the respondent has undertaken construction of the proposed project in accordance with any sanctioned plans which have been duly approved?
- V. Whether the respondent has any authority to undertake construction or sale of the project in question at the time of receiving booking amount or instalments from the complainant?



18. Relief sought

- I. Pass appropriate directions to the respondent directing a refund of the amount of Rs. 31,84,473/-.

- II. Pass appropriate directions directing the respondent to pay interest at the rate of 18% p.a. or at such rates as may be prescribed on the amount of Rs. 31,84,473/- from the date of deposit till the date of actual receipt.

Respondent's reply

19. The respondent has denied each and every allegations and contentions raised by the complainants. They contended that the complaint is false, frivolous, malafide and an abuse of process of this authority. The complainant has failed to approach the authority with clean hands lacks bonafide intents and suppressed material and is as such guilty of *suppresioveri* and *suggestiofalsi*.
20. The respondent has submitted that the complainants are investors who have made investment in the project and till date have only paid an amount only of Rs. 31,84,473/-.
21. The respondent submitted that the complainants despite being fully aware of the status of the project and the reasons for delay that being beyond the control of the respondent, the complainants herein filed the present complaint and the same is based on absolutely concocted and misconceived statements.



22. It was further submitted by the respondent that M/s. Prime IT Solutions P. Ltd. entered into a development agreement on 06.12.2011 and the same was duly registered. In furtherance of the development agreement, an application for grant of license by DTCP was submitted by M/s Prime IT Solutions P. Ltd. , later the said company and developer had executed a term sheet which took the shape of the collaboration agreement.
23. The respondent submitted that a general power of attorney was also executed by M/s. Prime IT Solution in favour of developer. It was further submitted by the respondent that they had obtained all necessary permissions and sanctions for the commercial project in question.
24. The respondent submitted that they got letter of intent on 24.05.2011 and subsequently license no. 47 of 2012 and license no. 51 of 2012 was granted on 12.05.2012 and 17.05.2012. Further the building plan was also sanctioned
25. The respondent submitted that the respondent applied for environment clearance vide application dated 06.11.2012 and was granted the environment clearance for the construction of the said project.



26. The respondent filed a suit bearing no. 149SK titled as *Imperia Wishfield Private Limited versus Prime IT Solution Private Limited* whereby seeking the relief of declaration along with consequential relief of permanent injunction against the Prime IT Solution Private Limited and other landowners. The hon'ble civil court has passed the order in the shape of compromise decree in and issued direction to prepare the decree sheet accordingly. The decree sheet judgement and sanctioning of mutation no. 2117 for transfer of the ownership of project land to Imperia Wishfield Private Limited was declared the owner of the property in question.
27. The respondent submitted that by virtue of acts in law, above permissions, agreement and court decree, they have become the absolute right to market, sell, allot plots, etc. and as such became competent to enter into agreements.
28. The respondent submitted that the construction at the site is being done in phase and in going in full swing. It was further submitted by the respondent that the complainant is bound by the terms of the application form and therefore the dispute if any falls within the ambit of civil dispute and all other allegations levelled by the complainant are false and baseless.



29. It is submitted that the respondent has already invested the entire sum of money received by the respondent towards the said unit in the construction of the said project. Therefore, the respondent is not in position to refund the same to the complainants

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

30. In respect of **first issue** raised by the complainants, the complainants have failed to furnish any concrete proof in order to establish any misrepresentation on the part of the respondent regarding necessary sanctions and approvals in order to carry out construction. Thus, this issue is decided in negative.

31. In respect of **second issue** raised by the complainants, the complainants have submitted in his reply that the construction of the tower in question is completed up till 15th floor. As per the report of the local commissioner, the project is 42.20% financially completed and 30% of physical work has been completed. Therefore, refund cannot be allowed at this stage.



32. In respect of **third issue** raised by the complainants, as per clause 11(a) of the studio apartment buyer's agreement dated 13.03.2014, the due date for delivery of possession comes out to be 13.03.2019. However, the respondent failed in handing over possession by the said due date.
33. In respect of **fourth and fifth issue** raised by the complainants, the complainants have not furnished any documentary proof in order to firmly ascertain whether the construction was not carried out in accordance with the sanctioned plans and approvals or the respondent, in the first place, had not any authority to undertake construction or sale of the project in question.
34. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
35. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
36. The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.



Findings of the authority

37. **Jurisdiction of the authority-** The project “Elvedor” is located in Sector 37-C, Gurugram. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

38. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

39. The authority is of the view that the respondent has not delivered the unit in time. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest.

40. **Report of local commissioner:** The local commissioner was appointed in the project named ‘Elvedor’ to ascertain the status of the project. In the report, it is submitted that the



complainant has applied for commercial unit in the building of commercial colony measuring 2.00 acres approved by DTCP, Haryana Chandigarh vide license no. 47 of 2012 dated 12.05.2012 was issued in favour of Prime I.T Solutions Pvt. Ltd. and others in Sector 37-C, Gurugram.

41. That neither license nor building plan was approved by Director General Town & Country Planning, Haryana, Chandigarh in favour of M/s Imperia Wishfield Pvt. Ltd.

42. That since the estimated cost and expenditure incurred figures are available for the project 'Elvedor' being developed by M/s Imperia Wishfield Pvt. Ltd. The overall progress of the said project has been assessed on the basis of expenditure incurred and actual work done at site on 24.01.2019. Keeping in view above facts and figures, it is reported that the work has been completed with respect to financially is 42.20% whereas the work physically completed is about 30% approximately.

43. **Objections raised on behalf of the respondent to the report of local commissioner:** The respondent submitted that inspection in the present case was conducted by the local commissioner on 24.01.2019. However, from the very inception, the attitude/conduct of the local commissioner was completely biased and prejudiced. The local commissioner



completely lacked the competence and capability expected/required for physical verification of status of construction and appreciation of sanctions/permissions granted by the concerned statutory authority in relation to the project.

44. The respondent submitted that the officials of the respondent had tried their level best to assist the local commissioner, but for reasons best known to the local commissioner, he was not at all receptive and/or inclined to listen to valid submissions sought to be made by them. Consequently, the report submitted by the local commissioner is absolutely illegal, unfair, biased, factually incorrect and does not serve the purpose for which the local commissioner had been appointed.
45. The respondent submitted that the report submitted by the local commissioner is contrary to the actual state of affairs prevailing at the spot. It has been illogically and irrationally contended by the local commissioner that neither the license nor building plan had been approved by Director General, Town and Country Planning, Haryana, Chandigarh in favour of the respondent.
46. The respondent submitted that the concerned statutory authority had also granted Environmental Clearance for the



project on 06.11.2012. The building plans for the project had also been sanctioned by the concerned statutory authority. Other requisite permissions/clearances were also granted for the project. That in the mean time differences had arisen between Prime I T Solutions Private Limited, respondent and Mr. Devi Ram (land owner). The same had culminated in institution of suit for declaration with consequential relief of permanent injunction titled "*Imperia Wishfield Private Limited versus Prime IT Solutions Private Limited and others*".

47. The respondent submitted that judgment dated 21.01.2016 (Annexure RA) had been passed by Mr. Sanjeev Kajla the then Civil Judge, Gurgaon whereby the respondent had been declared to be absolute owner in exclusive possession of project land. The passing of judgment referred to above had been duly reported to the concerned revenue authorities and mutation bearing number 2117 (Annexure RB) had been sanctioned on the basis of judgment and decree referred to above. In this manner, the respondent had become full-fledged and lawful owner in possession of the project site.

48. The respondent submitted that in the meantime differences had arisen between Prime I T Solutions Private Limited, respondent and Mr. Devi Ram (land owner). The same had



culminated in institution of suit for declaration with consequential relief of permanent injunction titled “Imperia Wishfield Private Limited versus Prime IT Solutions Private Limited and another”.

49. The respondent submitted that judgment dated 21.01.2016 (annexure RC) had been passed by Mr. Sanjeev Kajla the then Civil Judge, Gurgaon whereby the respondent had been declared to be absolute owner in exclusive possession of project land. The passing of judgment referred to above had been duly reported to the concerned revenue authorities and mutation bearing number 2116 (annexure RD) had been sanctioned on the basis of judgment and decree referred to above. In this manner, the respondent had become full-fledged and lawful owner in possession of the project site.

50. The respondent submitted that the fact of passing of judgment referred to above was duly reported to the office of Director General, Town & Country Planning, Haryana, Chandigarh. The matter is pending for consideration with the aforesaid statutory authority for transfer of licence in favour of the respondent in furtherance of judgements/decrees referred to above. All these facts were brought to the attention of the local commissioner.



51. The respondent submitted that the officials of the respondent had even offered to supply photocopies of all the documents referred to above to the local commissioner. It was also specifically pointed out to the local commissioner that the fact of passing of judgments/decrees had been mentioned in the reply filed by the respondent. However, for reasons best known to the local commissioner, he was simply not inclined to hear anything in this regard or even to accept or consider documents.

52. The respondent submitted that as a consequence an erroneous and flawed observation is contained in the report submitted by the local commissioner that the licence/building plans are not in favour of the respondent. In fact, if the entire factual matrix of the case had been considered in the correct perspective, this illegal observation would not have been made by the local commissioner. Consequently, it is evident that the observation of the local commissioner referred to above is contrary to record and deserves to be disregarded/ignored.

53. The respondent submitted that on the basis of erroneous observations completely contrary to facts, a grossly illegal conclusion was drawn in the end of his report by the local



commissioner. It was wrongly and illegally held by the local commissioner that in the execution of “Elvedor” project, work had been completed with respect to 30% of the total area although financially 42.2% component had been allegedly realised by the respondent. In fact, structure of the project stands almost completed at the spot.

54. The respondent specifically refutes the correctness of this calculation. The same is arbitrary, whimsical and lacks any rational. It had been brought to the attention of the local commissioner that substantial expenditure had been incurred by the respondent in making payment to the landowners/ Prime IT Solutions Private Limited and also in payment of external development charges, infrastructure development charges.

55. That it was further brought to the attention of the local commissioner by the officials of the respondent that before determining the quantum of finance collected and the extent of work done, the aforesaid components of expenditure incurred by the respondent should be legitimately taken into account. However, for reasons best known to the local commissioner, the same has not been done.



Directions of the authority

56. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent:

- (i) The respondent is directed to give the complainants delayed possession charges at prescribed rate of interest i.e 10.75% per annum w.e.f 13.03.2019 as per the provisions of section 18(1) of the Act, till the offer of possession.
- (ii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till the offer of possession shall be paid before 10th of subsequent month.
- (iii) In case the respondent fails to deliver the possession of the unit to the complainant by March 2020, in that case the complainant is at liberty to approach for refund.



57. A copy of this order be endorsed to registration branch for further action in the matter.

58. The order is pronounced.

59. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Date: 28.03.2019

Judgement uploaded on 18.04.2019



HARERA
GURUGRAM

